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Supreme Court of the United States

OCTOBER TERM, 1957.

No. 446

MISSISSIPPI VALLEY BARGE LINE COMPANY,
Petitioner,

versus

T. L. JAMES & CO., INC., ET AL.,
Respondents.

On Petition for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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MAY IT PLEASE THE COURT:

I. OPINIONS BELOW.

The opinions below are reported as set forth on Page 1 of the Petition and are printed in the Appendix thereof, Page 29, *et seq.*

II. JURISDICTION.

Jurisdictional requisites are correctly set forth in the Petition but Respondents submit there is no basis for granting Writs of Certiorari.

III. STATUTES INVOLVED.

Petitioner has properly listed the statutes upon which it relies, but as the Courts below correctly held, since the marine movement in question herein was one of towage in the traditional sense under *Cornell Steamboat Co. v. United States*, 321 U.S. 634, 64 S. Ct. 768 (1944), the rules of towage and not common carriage govern the liability of the common carrier and, accordingly, the statutes listed have no pertinence or application and this Court's decision in *Bisso v. Inland Waterways Corporation*, 349 U.S. 85, 75 S. Ct. 629 (1955), is controlling.

IV. ARGUMENT.

A. Petitioner is really asking this Court to reconsider facts determined by the Courts below and this Court, quite properly, is not ordinarily concerned with the re-examination of factual findings.

Respondents submit that the real question presented is whether this Court should re-examine the factual findings of the Courts below. The District Court for the Eastern District of Louisiana, New Orleans Division, after hearing the witnesses in Open Court, and the Court of Appeals for the Fifth Circuit, after hearing oral argument and studying the record, both held that, on the basis of the testimony, the marine movement involved in this case was really a movement of towage and that, insofar as liability was concerned, the rules of towage controlled. Applying the rules of towage, liability was determined to exist and Respondents were allowed to recover their damages. The Petitioner, in essence, claims merely that

in holding the movement of the Barge LA BELLE constituted towage and not common carriage, the Courts below committed grevious error. It is obvicus from a reading of the Petition that this alleged factual error is the real basis for the request for Writs. For reasons which will be discussed at a later place in this brief, Respondents strongly urge that the Courts below correctly concluded the parties were contracting for towage service and not affreightment but, at any rate, certainly such a finding is not under ordinary circumstances a proper subject for review by this Court as this Court is concerned with legal questions of importance which are apt to reoccur, and not with the re-examination of specific factual findings.

B. Since this case turned on particular facts, its decision is limited in importance to the parties to the litigation and no legal issues involved affect the public generally.

This Court, taking cognizance of the pertinent language of the Interstate Commerce Act (Transportation Act of 1940), 49 U.S.C. Sec. 920(d), itself, held in *Cornell Steamboat Co. v. United States, supra*, that, although certificated companies engaged in what was towage were subject to regulation under the Act, it was not the intent of Congress to disturb the rules governing the liability of vessels or their owners for loss or damage to vessels in tow or cargo laden thereon. Accordingly, it was necessary for the Courts below to determine first whether the movement involved herein was one of towage or common carriage. If the movement were one of carriage,

the laws of common carriage were applicable and the Harter Act, 46 U.S.C. Sec. 190 et seq., was pertinent. If, however, the movement was towage, under the *Cornell* case, *supra*, and the cases which followed it, the rules of towage were applicable insofar as liability was concerned, even though Petitioner was a certificated common carrier. Therefore, the Courts below merely had to decide whether the movement was towage or carriage and then apply the applicable rules of liability to the facts. After hearing the witnesses in Open Court, the District Judge decided that the parties had actually made a contract for towage and not a contract of affreightment. The Court of Appeals for the Fifth Circuit concluded, without a dissent, that the factual findings of the District Court were correct and stated that the evidence actually "compelled the view that the parties were contracting not for affreightment but for a towage service . . ." Once that finding was made both Courts below made the further factual finding that the Petitioner was negligent in towing Respondents' barge and cargo. On the basis of these factual findings they had no alternative other than to ignore the various exculpatory clauses in the Petitioner's Tariff and to apply the established Admiralty doctrine laid down in the *Bisso* case, *supra*, and hold Petitioner, as tower, liable to Respondents, as owners of the property towed. The fact that if the movement was towage the law was properly applied has not been even disputed by Petitioner. Certainly, this case was decided on its own facts and no legal issues justifying the granting of Writs are involved.

C. The finding of the Courts below that the movement herein was towage is clearly substantiated by the evidence.

Even if this Court were inclined to re-examine factual findings, which it is not normally inclined to do, this litigation is not a proper case for review because it is so manifestly clear that the movement of the LA BELLE was actually one of towage. Cargo interests loaded and furnished the barge and contracted with the Petitioner merely to move the said Barge. Such a movement has been for years by custom and definition a towage movement. The testimony shows, as the Court of Appeals for the Fifth Circuit pointed out in its opinion, that both the oral agreement and the written confirmations provided solely for moving the barge itself. That Court further pointed out that Respondents' representative did not expect that a bill of lading would be issued and the bill of lading which was ultimately issued was not received until two weeks after the casualty. Actually, even the timely issuance of a bill of lading could not have made that which was really towage carriage for liability purposes. *Petition of Reliance Marine Transp. & Const. Corp.*, 89 F. Supp. 272, (D.C. Conn, 1950), 206 F. 2d. 240 (C.C.A. 2, 1953).

Petitioner maintains that Respondents' contractors equipment was a commodity, the transportation of which is regulated by Part III of the Interstate Commerce Act, *supra*, and that the Respondents could not have chartered a tug to tow the LA BELLE laden with this equipment except from a carrier certificated by the Interstate Com-

merce Commission. Even if true, this fact is not significant. Again, Attorneys for Petitioner ignore the *Cornell* litigation. Respondents do not deny that they were dealing with a certificated common carrier, but show under the *Cornell* decision, insofar as liability is concerned, the rules of towage apply because the movement was actually one of towage.

D. Petitioner's contention that the holding below is in conflict with the decision of this Court in Sacramento Navigation Company v. Salz and in conflict with decisions in the Second and Fourth Circuits does not bear analysis.

Respondents are of the opinion that the decision below is not in conflict with any decision of this Court or in conflict with any decision of any of the Courts of Appeal. Petitioner relies heavily on this Court's decision in the case of *Sacramento Navigation Company v. Salz*, 273 U.S. 326, 47 S. Ct. 368 (1926). However, in the *Salz* case, Sacramento Navigation Company was a carrier which owned and operated both the tug and the carrying barge and contracted to transport barley in sacks on its own barge. Such a contract has traditionally been a contract of affreightment. In this case, the Respondents furnished the barge and merely contracted with the Petitioner to move it with its cargo from New Orleans, Louisiana, to Cheatham Dam, Tennessee. As pointed out earlier, such a contract has always been by definition towage. Accordingly, the *Salz* case, instead of being analogous to the instant situation, actually pinpoints one of the principal differences between towage and carriage. At any rate,

it is not authority for Petitioner's argument that the ownership of the vessel whereon cargo is laden is wholly immaterial to the determination of whether a movement be towage or carriage.

Petitioner places great stress on the language of the *Salz* case to the effect that where a contract made by the shipper is a contract to transport goods and not a contract to move a vessel such a contract is a contract of affreightment. Petitioner urges that Respondents' motive was to have cargo transported and not to have a vessel moved and, accordingly, the movement in question falls under the doctrine of the *Salz* case. Admittedly, Respondents desired to get the contractors equipment to Cheatham Dam so that a cement plant could be dismantled. As a means of getting this equipment to Cheatham Dam they chartered and furnished a barge and contracted with Petitioner to move the said barge up the River. However, such a movement is, and has always been, towage, and if such a movement is not towage, there can be no towage. Since barges are built and used merely as instrumentalities to carry cargo, if Petitioner's position is sound, all marine movements by barge must necessarily be carriage. Of course, Petitioner ignores completely the fact that the Courts below specifically found the parties had entered into a contract for the movement of the loaded barge itself and not into a contract to transport cargo.

Judge Hutcheson, Chief Judge for the Fifth Circuit, in a unanimous opinion, said:

> "Upon the crucial question, whether the contract was and was intended to be one of towage rather than of affreightment, we are of the clear opinion that no other reasonable view can be taken of the evidence than that the district court took."

Petitioner also claims that the decision below is in conflict with the jurisprudence in the Second and Fourth Circuits and cites *In Re: O'Donnell*, 26 F. 2d. 334 (C.C.A. 2, 1928); *THE LEHIGH*, 12 F. Supp. 75 (W.D.N.Y. 1935); *THE VALE ROYAL*, 51 F. Supp. 412 (D.C. Md. 1943). However, all of these cases are clearly distinguishable. In the case of *In Re: O'Donnell*, *supra*, although there was no common ownership of the tug and barge, the tug owner and the barge owner were sharing profits and expenses and, if not actually partners, were engaged in a joint venture. The Court really held that the owner of the tug and the owner of the barge had made a joint contract of carriage with the shipper for the benefit of both pursuant to which they contributed to the venture their interests in the tug and barge, respectively. The contract with the shipper was clearly a contract to transport cargo and not, as here, a contract to move a barge.

In *THE LEHIGH*, *supra*, a District Court sitting in the Second Circuit merely followed the *O'Donnell* case and did not discuss the question of the relationship of the barge and tug with reference to the contract of carriage of the cargo upon the barge. In any event, the fact that

a District Court in the Second Circuit decided on an entirely different set of facts that a certain marine movement was carriage does not constitute such a conflict with the decision here of the Court of Appeals for the Fifth Circuit as to warrant the granting of Writs of Certiorari by this Court.

The third case urged as showing a conflict between the Circuits is that of the *V. LE ROYAL, supra.* Again we say this was a decision merely of a District Court based on an entirely different set of facts. The language of the decision reflects that the Court considered the importance of discussing and finding the fact that the barge, although separately owned from the tug, was under time charter to the tug owner and as to the cargo, the tug owner, in effect, was the owner *pro hac vice* of the barge, and the contract to carry the cargo was made for the benefit of the tug owner.

E. Gross inequities would result if this Court were to grant Writs or the holding of the Courts below were disturbed.

Gross inequities would result if this movement were held to be one of common carriage for liability purposes and the Harter Act were held to be applicable. This is true because, to hold that the rules of liability of common carriage apply, would have the effect of rendering the relatively recent decision of this Court in *Bisso v. Inland Waterways, supra,* declaring release towage agreements void as contrary to public policy, virtually meaningless in most instances where the owner of the negligent towing vessel was certificated by the Interstate Com-

merce Commission as a common carrier. The *Bisso* decision, *supra*, would be rendered virtually meaningless because the operators of vessels acting as common carriers could not be made answerable for damages resulting from the faulty management or navigation of their vessels as responsibility for such errors is specifically excluded by Section 3 of the Harter Act, 46 U.S.C. Sec. 192, if due diligence has been exercised to make the carrying vessel seaworthy. Quite obviously, most casualties in which towboats are involved are occasioned by errors in navigation and if it were held that the rules of common carriage and not towage apply where towboats operated by certificated companies are moving barges owned or furnished by cargo interests, the incredible result would be that vessels operating as common carriers would be in an infinitely better position from a liability standpoint than vessels operating under the rules of towage, although traditionally common carriers with good reason have been held to a higher degree of care than ordinary towers. Of course, the Petitioner realizes that in view of the *Bisso* decision, *supra*, responsibility for negligence can now be avoided only through the Harter Act and, accordingly, as the District Court Judge pointed out, is "adjusting its cap to fit the change in circumstance." It is indeed ironic to find River Operators who have long attempted to avoid liability as common carriers by insisting they were towers, now attempting to hold themselves out as common carriers for liability purposes in the teeth of this Court's decision in the *Cornell* case, *supra*.

Further, Section 3 of the Harter Act, *supra*, requires the "owner" of the vessel transporting the merchandise

to exercise due diligence to make the said vessel seaworthy as a condition precedent to securing the exoneration from liability provided and Petitioner neither owned, managed, controlled, nor had any interest in the LA BELLE. Of course, the whole purpose of the Harter Act was, and is, to encourage shipowners to keep their vessels in a seaworthy condition and protection was given in certain instances in return for diligence in maintaining seaworthiness. Obviously, it was not the intention of Congress to afford the owner of a towing vessel the protection of the Act when the barge being towed was furnished and/or was actually being physically maintained by its own owner or some other third party and there is no basis whatsoever, considering the history and application of the Act, for supposing that Congress had any intention of providing for the exercise of due diligence by a carrier in making seaworthy vessels or equipment owned or operated by others.

F. In the alternative, even if liability herein is governed by the rules of common carriage, which is denied, nevertheless, Respondents are entitled to recover their damages in this case and there is no reason to grant Writs.

Admittedly, in the case of domestic common carriage, if a carrier complies with the provisions of the Harter Act, it need not specifically contract for the exemption from negligence provided in certain instances by the Act. Accordingly, if Petitioner's towboat CHILDRESS, for purposes of liability, was acting as a domestic common carrier by water, the Harter Act has application.

However, Respondents submit, but entirely in the alternative, that even if the movement herein be considered one of common carriage for liability purposes, on the basis of the facts and the nature of the loss, Respondents are, nevertheless, entitled to recover their damages. This is so because Section 3 of the Harter Act, *supra*, exempts the carrier from responsibility only where the loss results from errors in management or navigation of the vessel and does not exempt the carrier from responsibility where the loss is occasioned as a result of failure to properly care for the cargo. In some cases it is very difficult to draw the line between errors in management or navigation of the vessel and failure to properly care for cargo, but in this case there is no such problem. As both Courts below found, the loss herein was occasioned by failure to properly care for the LA BELLE and, of course, under Petitioner's theory of the case the LA BELLE itself must be classified as cargo. As the District Judge concluded, "the cargo here, assuming this is a cargo contract, was the barge itself as well as its contents."

G. Petitioner cannot rely on the release towage agreement or any of the other clauses in its Tariff which exculpate it from the consequences of its own negligence and the Courts and not the Interstate Commerce Commission, as Petitioner contends, are the proper forums for determining whether release from negligence clauses are void as contrary to public policy.

Throughout this litigation Petitioner has maintained that the release agreement and all of the other exculpatory clauses and terms of its Tariff must be pre-

sumed to be reasonable and enforceable unless and until the Interstate Commerce Commission declares any one or more of them invalid and unenforceable. Neither the District Court nor the Court of Appeals for the Fifth Circuit were impressed at all with this contention and the District Judge appropriately explained in his opinion that "the inclusion of otherwise illegal release clauses in a tariff cannot make such clauses less illegal or more enforceable." Counsel for Respondents submit the Courts below are manifestly correct and that neither any such tariff nor the approval thereof by the Interstate Commerce Commission can be used or enforced in such a way as to vitiate the doctrine laid down by this Court in *Bisso v. Inland Waterways Corporation, supra.*

Petitioner cites *United States v. Western Pacific Railroad Company,* 352 U.S. 59, 77 S. Ct. 161 (1956), as authority for its contention that the Interstate Commerce Commission and not the Courts must pass on the reasonableness of such clauses of its Tariff and states that the decision below is in conflict with this Court's decision in that case. We must point out that the contention of the Petitioner that the Courts are powerless to declare illegal exculpatory clauses in Interstate Commerce Commission approved tariffs, and the litigant must first resort to the Interstate Commerce Commission is answered by the words of this Court itself in the decision relied upon by Petitioner for in *United States v. Western Pacific Railroad Company, supra,* this Court was very careful to limit the effect of its decision by saying, at page 69:

> "By no means do we imply that matters of tariff construction are never cognizable in the courts."

Further, in connection with the construction of another tariff this Court clearly held in the case of *St. Louis, Iron Mountain & Southern Railway Co. v. Hasty & Sons*, 255 U.S. 252, 41 S. Ct. 269 (1921), at page 256:

> "This matter is so free from doubt that there is no occasion to apply to the commission for a construction, as insisted by appellant . . ."

In *Great Northern Railway Company v. Merchants Elevator Company*, 259 U.S. 285, 42 S. Ct. 477 (1922), this Court likewise stated in a case concerning the construction of a Tariff that (page 294):

> "Here no fact, evidential or ultimate, is in controversy; and there is no occasion for the exercise of administrative discretion. The task to be performed as to determine the meaning of words of the tariff which were used in their ordinary sense, and to apply that meaning to the undisputed facts. That operation was solely one of construction; and preliminary resort to the Commission was, therefore unnecessary."

We hardly need call the Court's attention to the fact that in *United States v. Western Pacific Railroad Company, supra*, the question involved concerned tariff classifications and rates, while in this case there is no question of tariff classifications or rates but solely a legal question as to the validity and construction of exculpatory clauses which the Courts are preeminently the fit tribunals to pass upon rather than the Interstate Commerce Commission. This is especially true since the Interstate Commerce Act (Transportation Act of 1940),

supra, under the terms of which Petitioner is certificated, specifically provides that it was not the intent of Congress to change the legal liabilities of vessels for damages.

V. CONCLUSION.

Respondents respectfully submit that the opinions of this Court and recent expressions of many of the individual Justices thereof show clearly that this is the very type of case which this Court should not be expected to review since the opinions of the two Courts below were based entirely upon concurrent findings of fact and of negligence. Justices Frankfurter and Harlan in *Rogers v. Missouri P. R.R. Co.*, 352 U.S. 521, decided on February 25, 1957, in separate opinions, gave emphatic legal and practical reasons why this Court should not grant certiorari to review evidence, particularly in negligence cases, even in those arising under federal statutes. See also Per Curiam opinion of this Court in *McCarthy v. Bruner*, 323 U.S. 673, 65 S. Ct., 126 (1944).

Chief Justice Taft earlier in 1923 expressed the unanimous views of this Court on this subject in no uncertain terms in the case of *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387 43 S. Ct. 422 (1923) as follows at page 393:

> ". . .it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and

embarrassing conflict of opinion and authority between the circuit courts of appeal."

See also *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508, 44 S. Ct. 164 (1924).

In conclusion, Respondents submit that this case was decided entirely on its own facts in the Courts below; that the decision of the Court of Appeals for the Fifth Circuit does not conflict with any decisions of any other Courts of Appeal or conflict with any decisions of this Court; that the Courts below have not decided any important question of Federal law which should be settled by this Court and that, accordingly, there is no basis for granting Writs of Certiorari.

Respectfully submitted,

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